Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party)

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–97 OF 1996
CHEW SOO HO JC
29 JULY 2010

Tort — Negligence — Adjoining properties — Vibration from defendant's piling works damaged plaintiff's property — Whether defendant's negligence proved — Whether facts to support prayers for aggravated and exemplary damages pleaded

The plaintiff owned and occupied the Cheong Fatt Tze Mansion, also known as the Blue Mansion, in North East District, Penang. The Chinese Courtyard Mansion, intricately decorated with Chinese artisan works and carvings and architecturally considered one of only two outside of China of its style and size, was built in the 1880s and had won, among others, UNESCO's Award of Excellence for Cultural Heritage Conservation in the year 2000. The defendant, which owned the adjoining land on which Hotel Continental was situated, commenced piling work on its land to put up a 20-storey extension to the hotel. This was about three months after the plaintiff had completed a RM3m five-year restoration work to the mansion to restore it to its heritage status. Despite being advised against it by the plaintiff, the defendant employed the hydraulic piling method which caused excessive vibrations that caused extensive cracks and other damages to the mansion, the walls of which were non-reinforced load bearing masonry sensitive to ground movements. The plaintiff said it had advised the defendant to use bore piles instead of hammer-driven piles but the defendant ignored the advice. The plaintiff sued the defendant for negligence and/or nuisance and claimed RM500,000 in general damages, RM1.2m in special damages to rectify the damage caused to the mansion, RM106,125 as professional fees of the architect for the rectification works, RM126,602 as professional fees incurred by the plaintiff in monitoring and assessing the damage to the mansion during the course of the piling works, RM750,000 in aggravated damages, RM750,000 in exemplary damages and costs. The defendant added the party that carried out the piling works as a third party to the suit claiming indemnity against it in the event the defendant was held liable to the plaintiff.

Held, allowing the claim with costs:

(1) From the defendant's conduct in failing to heed the concern of PW1 who had categorically informed DW1 of the probable damage to the mansion if it used the hammer-driven piling system, the breaches by the defendant

of the Street, Drainage and Building Act 1974 and the Penang Island Earthworks By-Laws 1975 and its failure to conduct soil investigation on the hotel extension site before commencement of piling, the court found the defendant failed to exercise reasonable care to prevent damage or injury to the plaintiff's property (see paras 22 & 24).

(2) The damages caused by the defendant's breach of duty of care was forseeable as it knew in advance that the mansion's walls were non-reinforced load-bearing masonry sensitive to ground movements (see para 24).

(3) Having considered the evidence and reports of the engineers, PW2 and DW1, the court accepted the evidence and professional view of PW2 that the defendant's piling works caused the cracks on the mansion nearest the piling site. The evidence of DW1 that the cracks were pre-existing and caused by traffic vibrations and other factors and not by the defendant's piling works was improbable (see para 17).

(4) The plaintiff failed to plead the particular facts of the defendant's wrongful acts that injured their feelings, pride or dignity. This was a fundamental flaw in the claim for aggravated damages. There was also no evidence the plaintiff 's feelings, pride or dignity were injured by the defendant's failure to heed their request to cease piling, to adopt their consultant engineer's recommended method of reducing vibrations or to follow the local authority's stop-work orders (see paras 49 & 50).

(5) The defendant decided to proceed at all costs with the piling work to complete the hotel extension by 1998 before the Commonwealth Games. They were desperate to proceed on the probability that their profits would over-ride the losses or damages to the plaintiff. It was conduct calculated to result in a profit and the defendant was prepared to ignore the plaintiff's rights and breach their duty of care to the plaintiff. The plaintiff had therefore proved its claim for exemplary damages (see paras 54 & 61).

(6) No evidence was adduced by the third party to rebut the charge that their piling works had caused damage to the mansion. The third party was accordingly liable to indemnify the defendant for the general and special damages awarded against the defendant (see para 69).

[Bahasa Malaysia summary

Plaintif memiliki dan menghuni Rumah Agam Cheong Fatt Tze, juga dikenali sebagai Rumah Agam Biru, di Daerah Timur Laut, Pulau Pinang. Rumah Agam Laman Dalam China, dihias dengan jalinan kerja seni dan ukiran China dan hasil arkiteknya dianggap sebagai salah satu daripada dua binaan di luar Negara China mengikut gaya dan saiznya, telah dibina dalam tahun 1880an dan telah memenangi, antara lain, Anugerah Kecemerlangan Pemuliharaan

Warisan Budaya pada tahun 2000. Defendan, yang memiliki tanah bersebelahan di mana terletaknya Hotel Continental, telah memulakan kerja pemantakan ke atas tanahnya untuk menambah binaan 20 tingkat kepada hotel itu. Ini adalah lebih kurang tiga bulan selepas plaintif siap kerja pemulihan RM3 juta selama lima tahun ke atas rumah agam itu bagi mengembalikan status warisannya. Meskipun telah dinasihat oleh plaintif agar tidak melakukannya, defendan telah menggunakan cara pemantakan hidrolik yang telah mengakibatkan gegaran kuat sehingga menyebabkan retakan dan kerosakan lain kepada rumah agam tersebut, di mana dindingnya tidak diperteguhkan untuk menampung beban batu yang sensitif terhadap pergerakan tanah. Plaintif mengatakan ia telah menasihati defendan untuk menggunakan pemantakan gerek dan bukan pemantakan gerudi tukul tetapi defendan tidak mengendahkan nasihat itu. Plaintif telah menyaman defendan kerana kecuaian dan/atau kacau ganggu dan menuntut ganti rugi am sebanyak RM500,000, ganti rugi khas sebanyak RM1.2 juta untuk memperbaiki kerosakan yang diakibatkan ke atas rumah agam itu, yuran professional sebanyak rm126,602 yang ditanggung oleh plaintif dalam mengawasi dan menaksir ganti rugi ke atas rumah agam semasa kerja memantakkan cerucuk, ganti rugi tambahan sebanyak RM750,000, ganti rugi teladan berjumlah RM750,000 dan kos. Defendan telah menambah pihak yang menjalankan kerja-kerja pemantakan sebagai pihak ketiga kepada guaman itu menuntut indemniti terhadapnya sekira defendan didapati bertanggungjawab kepada plaintif.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Berdasarkan perlakuan defendan yang gagal mengambil endah kebimbangan PW1 yang telah memberitahu DW1 tentang kerosakan yang mungkin berlaku jika ia menggunakan sistem pemantakkan gerudi tukul, pelanggaran oleh defendan terhadap Akta Jalan, Parit dan Bangunan 1974 dan Undang-undang Kecil Kerja Tanah Pulau Pinang dan kegagalannya untuk melakukan pemeriksaan tanah di tapak penambahan hotel sebelum pemantakan dimulakan mahkamah mendapati defendan telah gagal untuk melaksanakan sikap berjaga-jaga yang sewajarnya untuk mengelakkan kerosakan atau kerugian ke atas hartanah plaintif (lihat perenggan 22 & 24).

(2) Kerosakan yang disebabkan oleh defendan akibat pelanggaran kewajipan berjaga-jaga boleh dijangkakan kerana ia mengetahui terlebih dahulu bahawa dinding rumah agam itu tidak diperteguhkan untuk dapat menampung beban batu dan tidak sensitif kepada pergerakan tanah (lihat perenggan 24).

(3) Setelah mengambilkira keterangan dan laporan jurutera, PW2 dan DW1, mahkamah menerima keterangan dan pandangan profesional PW2 bahawa kerja pemantakan defendan telah menyebabkan retakan ke

atas rumah agam di tapak pemantakan terdekat. Keterangan DW1 bahawa retakan itu telah ada sebelum itu dan disebabkan oleh gegaran lalu lintas dan faktor lain dan bukan oleh kerja pemantakan adalah tidak mungkin (lihat perenggan 17).

(4) Plaintif telah gagal untuk memplid fakta tertentu tentang tindakan salah defendan yang mengguris perasaan, maruah atau harga diri mereka. Ini merupakan kecacatan jelas dalam tuntutan untuk ganti rugi tambahan. Tiada juga keterangan bahawa perasaan, maruah atau harga diri plaintif terjejas akibat daripada kegagalan defendan mengambil perhatian tentang permintaan mereka untuk berhenti kerja pemantakan, untuk menggunakan cara mengurangkan gegaran berdasarkan saranan perunding jurutera mereka atau menurut perintah berhenti kerja pihak berkuasa (lihat perenggan 49 & 50).

(5) Defendan membuat keputusan untuk meneruskan kerja pemantakan walaupun apa kosnya untuk menyiapkan kerja penambahan hotel menjelang 1998 sebelum Sukan Komanwel. Mereka terdesak untuk meneruskannya atas kebarangkalian yang keuntungan mereka akan mengatasi kerugian atau ganti rugi plaintif. Ia perlakuan yang dikira akan menghasilkan keuntungan dan defendan bersedia untuk tidak menghiraukan hak plaintif dan pelanggaran kewajipan berjaga-jaga mereka kepada plaintif. Oleh itu plaintif telah membuktikan tuntutannya untuk ganti rugi teladan (lihat perenggan 54 & 61).

(6) Pihak ketiga tidak mengemukakan apa-apa keterangan untuk mematahkan pertuduhan bahawa kerja pemantakan mereka telah mengakibatkan kerosakan ke atas rumah agam itu. Pihak ketiga juga wajar bertanggungjawab untuk menanggung rugi defendan untuk ganti rugi am dan khas yang diawardkan terhadap defendan (lihat perenggan 69).]

Notes

For cases on negligence to adjoining properties, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 776–790.

Cases referred to

AB v South West Water Services Ltd [1993] 1 All ER 609, CA (refd)

Andreac v Selfridge & Company Ltd [1937] All ER 255, CA (refd)

Broome v Cassell & Co Ltd [1972] AC 1027, HL (refd)

Bumiputra-Commerce Bank Bhd v Top-A Plastic Sdn Bhd [2008] 5 MLJ 34, CA (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)

Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd [1996] MLJU 357; [1996] 4 CLJ 355, HC (folld)

Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 All ER 928; [1980] 1 WLR 433, CA (refd)
Donoghue v Stevenson [1932] AC 562, HL (refd)
Australian Consolidated Press v Uren [1969] 1 AC 590
Grosvenor Hotel Co v Hamilton [1894] 2 QB 836, CA (refd)
Hoare and Co v McAlpine [1923] 1 Ch 167 (refd)
Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd [2002] 3 MLJ 529, CA (refd)
Hughes v Lord Advocate [1963] AC 837, HL (refd)
KC Lim & Association v Pembenaan Udarama Sdn Bhd [1980] 2 MLJ 26, FC (refd)
Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor [2007] 5 MLJ 13; [2007] 4 CLJ 293, CA (distd)
Kuddus v Chief Constable of Leicestershire Constabulary [2001] 3 All ER 193, HL
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610, CA (refd)
Ley v Hamilton (1935) 153 LT 384, HL (refd)
Liew Choy Hung v Shah Alam Properties Sdn Bhd [1997] 2 MLJ 309; [1997] 2 CLJ 601, SC (refd)
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL (refd)
Real Marble Works Sdn Bhd v Teh Khoon Chuan Trading Sdn Bhd & Ors [1999] 6 MLJ 140; [1999] 3 AMR 3393, HC (not folld)
Rookes v Barnard [1964] AC 1129, HL (refd)
Rowlands v Chief Constable of Merseyside Police [2006] 1 WLR 1065, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor [2010] 3 MLJ 569, CA (refd)
Thompson v Commissioner of Police of the Metropolis and Hsu v Commissioner of Police of the Metropolis [1998] QB 498, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Companies Act 1965 s 236
Evidence Act 1950 ss 102, 103, 120(1)
Rules of the High Court 1980 O 16 r 5, O 18, O 18 r 12(1)(b)
Street, Drainage and Building Act 1974 s 70A(1), s 70A(4), s 70A(10)

JA Yeoh (MY Nga with him) (Shearn Delamore & Co) for the plaintiff.
Jefrrey Peh (Ranjit Singh & Yeoh) for the defendant.
Balachandran Mahesan (Bala Mahesan & Khairudin) for the third party.

Chew Soo Ho JC:

[1] The plaintiff is the registered proprietor and occupier of the property known as No 21 and 22, Town Subdivision 19, North East District, Penang on which a building commonly known as Cheong Fatt Tze Mansion also known as the Blue Mansion was erected ('the mansion').

[2] The defendant is the registered proprietor of an adjoining land known as No 23, Town Subdivision 19, North East District, Penang on which the Hotel Continental was erected ('the hotel').

[3] At the material time the defendant was in the process of building a 20 storey extension to the hotel on a portion of its land at the back of the hotel which was adjacent to the back portion of the mansion separated only by an 18ft wide service road.

[4] The plaintiff alleged that upon the defendant commencing piling work on the site of its land on or about 18 March 1996 by means of hydraulic piling system, the piling system that involved hammering pre-stressed large displacement concrete piles into the ground, had caused excessive vibrations which resulted in severe cracks on the walls of the mansion which were non-reinforced load bearing masonry sensitive to ground movements. Cracks also appeared on terraces, floors and roofs; ceramic balusters broke, doors could not close, geometric floor tiles split, roof tiles cracked, decorative works fell, large teak timber beams sagged, large carved capitals split and sagged; among others. On account of the failure of the defendant to adopt the necessary measures including an alternative piling system to alleviate excessive vibrations which caused the cracks on the walls of the mansion, plaintiff suffered damages and claimed against the defendant on ground of nuisance and/or negligence.

[5] The mansion was built in 1880's and was the home of Cheong Fatt Tze till 1916. Cheong Fatt Tze was a Mandarin of the highest order, Consul General for China, referred to as 'China's last Mandarin and First Capitalist' and 'Rockefeller of the East' by the New York Times. Architecturally, the building is termed a Chinese Courtyard Mansion intricately decorated with Chinese artisan works and carvings. It also incorporates European features such as English stained glass windows, geometric floor tiles from Stoke-on-Trent in Staffordshire, England and Scottish ironworks from Glosgow. It is considered an architectural jewel, one of only two outside of China of this style and size having 38 rooms, five courtyards and seven staircases.

[6] After the plaintiff had purchased the mansion, a sum of about RM3m was expended for restoration works, including preserving and conserving the features and fabric and tapestry to its original state. These restoration works commenced sometime in 1990 and were completed towards the end of December 1995. They involved the engagement of expert craftsmen from China to supervise the restoration of intricate and delicate porcelain tapestry works, specialised roof tiles, hardwood timber works and carvings. The mansion was fully repaired and restored to its heritage status. In recognition of the restoration works, it had won the top conservation award of the Pertubuhan Arkitek Malaysia and the UNESCO's top Award of Excellence for Cultural Heritage Conservation in 2000.

[7] For the damages to the mansion, the plaintiff had expended a sum of RM223,629.34 for temporary repairs which the plaintiff is not claiming in keeping with its duty to mitigate the loss. However, the plaintiff is seeking from the defendant general damages in the sum of not less than RM500,000; special damages of RM1,200,000 or such sum as may be determined by the court to account of the costs of rectification to make good the cracks and the damage to the mansion, a sum of RM106,125 being professional fees of the architect for the rectification works, and a sum of RM126,602 being professional fees incurred by the plaintiff in monitoring and assessing the damage to the mansion during the course of the said piling works; aggravated damages of not less than RM750,000 and exemplary damages of not less than RM750,000; and costs.

[8] The defendant's defence and contention is that they had deployed the appropriate piling method and had taken measures to minimise vibrations caused by the piling work. The defendant contended that the cracks of the mansion were or could have been caused by vibrations from the passing traffic along the road where the mansion is located and denied that it was the piling work which caused the cracks and/or damages to the mansion.

[9] The third party which is insolvent was represented by its insurer's solicitor who was given the consent by the Insolvency Department to proceed with this trial basically to protect the interest of the insurer who was insured by the third party against any damages etc arising from the piling work carried out by the third party for the defendant. The third party's primary contention is that they had followed the instructions of the consultant civil engineer of the second defendant and they cannot be held liable since they did what had been instructed by the defendant.

THE ISSUES

[10] The issues before the court is (1) whether the plaintiff has proved on a

balance of probabilities, nuisance and/or negligence on the part of the defendant from the piling work on their land adjoining the plaintiffs mansion which was carried out by the third party; (2) whether the plaintiff has proved that the cracks and/or damages to the mansion were caused by the piling work on the defendant's land; and (3) whether the plaintiff has proved the damages as claimed. In the event the defendant is held liable to the plaintiff, is the third party who had insured against their risk liable to indemnify the defendant.

EVALUATION AND FINDINGS

First issue: Whether plaintiff had proved nuisance and/or negligence

Nuisance

[11] In *Clerk & Lindsell on Torts* (17th Ed)1995 at p 891 para 18.05, the learned author defines a private nuisance in the following words:

> In private nuisance,... the conduct of the defendant which results in the nuisance is, of itself, not necessarily or usually unlawful. A private nuisance may be and usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass, (2) causing physical damage to his neighbour's land or building or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land. It may be a nuisance when a person does something on his own property which interferes with his neighbour's ability to enjoy his property by putting it to profitable use. It is also a nuisance to interfere with some easement or profit or other right used or enjoyed with his neighbour's land.

Several examples were given by the learned author at p 892 para 18-06 and one of which that is relevant to our case is 'sets up vibrations on his own land which cause damage to his neighbour's buildings' referring to the cases of *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836; *Hoare & Co v McAlpine* [1923] 1 Ch 167.

[12] The plaintiff in its submission expressed that its action is grounded on nuisance causing physical damage or injury to property which is the second category as illustrated in para 18-05 in *Clerk & Lindsell on Torts* quoted above. Citing paras 20 - 33 from *Clerk & Lindsell on Torts* at p 1181 which says:

> Existence of tort already established. Moreover, important as injunction is as a remedy characterizing nuisance, the question of issuing an injunction only arises when it has been decided that there is an actual or imminent nuisance to stop or prevent. And where the court has reached the stage of ruling upon the remedy, 'consideration of the strictness of the duty is then out of place'. Provided that the

general conditions for the equitable remedy are satisfied, the injunction is awarded because the existence of the tort is already established.

[13] The plaintiff submitted that the earlier findings of the court in granting an injunction restraining the defendant from causing or permitting piling and/or related building works to continue pending the appointment of an independent firm of consultant engineers to determine an alternative system of piling to avert any vibration or nuisance or any further damage are therefore relevant for purposes of this trial referring to *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd* [1996] MLJU 357; [1996] 4 CLJ 155 in which plaintiff's application for injunction against the defendant was granted. The defendant had appealed against that decision and its appeal to the Court of Appeal was dismissed vide *Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd* [2002] 3 MLJ 529. The plaintiff submitted that the observations of the Court of Appeal are relevant for the trial of this case. Having gone through the two preceding cases, I cannot rule out the relevancy that they may have on the trial of this case especially on the facts that are substantially and materially similar to what the parties have adduced before this court. Nevertheless, I must consider the evidence that is before me on the basis that this is a separate trial but where necessary and relevant, the findings of the two preceding cases will be referred to and especially the finding of the Court of Appeal which has binding effect on this court. From the facts and evidence before this court, there is no dispute as to the status of the mansion being a heritage building built in the 1880's, the walls of which were non-reinforced load bearing masonry sensitive to ground movements. The mansion which was in dilapidated condition was restored as far as practically possible to its original 19th century state at the end of December 1995. According to PW1, Laurence Loh Kwong Yu, a director of the plaintiff and an architect experienced in restoration and conservation of heritage buildings, the restoration works were paintaking. They involved the importation of original materials and engagement of expert craftsmen from China to undertake the intricate carved timber works and delicate porcelain tapestry works. Disregarding the damages or cracks caused by the piling works by the defendant, the standard or quality of the plaintiff's restoration works had received the awards from the Pertubuhan Arkitek Malaysia and UNESCO in recognition of the restoration works.

[14] The defendant appointed the firm of civil engineers, Messrs Jurutera Nasional which commenced piling works on or about 18 March 1996 on the defendant's land which is adjacent to the back portion of the mansion separated by a back lane of approximately 18ft wide for the construction of a 20 storey hotel which is an extension to the defendant's existing hotel. The system of piling used was by way of hydraulic, hammer-driven piling which is by dropping a hammer head from a height onto the spun piles into the ground.

PW1 said he had had a telephone conservation with Mr Loh Lean Cheng (DW1), the civil engineer of the defendant on 15 March 1996 before the commencement of the piling works expressing his concern over the use of the hammer-driven piles which might cause excessive vibrations and was very likely to cause damage to the mansion as the walls are non-reinforced load bearing masonry walls which are sensitive to ground movements, and suggesting that the system of piling should be changed to bore piles instead of hammer-driven piles but DW1 responded that there was no possibility of damage to the mansion by hammer-driven piles which he recommended to use and there was no cause of concern as he knew what he was doing. Within 24 hours of the commencement of the piling works, PW1 said that cracks began to appear on the walls of the mansion as a result of the excessive vibrations. The plaintiff had orally and by letter notified the defendant of the cracks and had requested the defendant to cease piling works pending an alternative system which could avoid excessive vibrations. The defendant did not heed the plaintiff's request and through Messrs Jurutera Nasional undertook to adopt additional precautionary measures and to make good any damage resulting therefrom. The plaintiff then sought the opinion of Messrs Perunding YAA Sdn Bhd, a firm of consultant engineers. PW2 Dato' Yap Ching Chan, a Consultant Engineer and Managing Director of Messrs Perunding YAA Sdn Bhd, had carried out site inspection on the defendant's land and on the mansion on 28 March 1996 to assess the effects of the piling works which were being carried out on the defendant's land. He said that apart from the vibrations felt from the piling works that were in progress, he noticed numerous cracks on the parapet walls of the balcony of the mansion. His other observations were that further cracks would appear on the mansion as long as the piling works were in progress. On 29 March 1996, PW2 inspected the mansion again and observed that extensive vibrations could be felt at the north east end of the first floor balcony which was approximately nine metres diagonally from the piling site. Numerous fresh cracks had appeared on the parapet walls of the balcony, the terracotta floor tiles on the ground floor at the rear portion of the mansion and the apron at the north east end of the mansion. He noted the most severe was a vertical crack at the joint of the main building and the north east wing. No cracks were observed on the south-west wing of the mansion which was away from the piling area. He asserted that all the cracks were clean fresh cracks as there were no fungus growth nor stain marks in the cracks and all the cracks were localised at the north east end of the mansion which is directly behind the hotel extension site where piling works were being carried out. PW2 gave the view that unless some alternative system of piling was adopted to avert vibration, 'the safety and structural stability of the mansion would be severely compromised considering the age and foundation of the building, and other features peculiar to buildings of that era'; see P27, PW2's report. PW2 had also queried on the failure of the defendant's engineer to conduct soil investigations on the defendant's land and the failure to submit earthworks plan for the approval of Majlis Perbandaran Pulau Pinang (MPPP).

PW2 is affirmative that the cracks appearing on the mansion were caused by the vibrations from the piling works. On his further site inspection on 19 July 1996, PW2 found widening of the cracks, soil settlement resulting in two of the doors at the mansion could not be closed, vertical alignment of the wall of the right wing was disaligned with the upper half of the back wall leaning towards the back boundary, the north corner of the right side wing which had cracked previously had fallen off due to the settlement and the apron adjacent to the right side wing had cracked and had separated from the wall proper. On his final inspection on 2 August 1996, PW2 noted that fresh cracks were more widespread and appearing in the back walls, internal walls, floors and roofs of the mansion. Settlement was more evident from the timber capitals along the side wing moving apart unevenly from the timber floor beams of the first floor; the floor beams had also settled unevenly.

[15] The defendant's defence through evidence of DW1 Loh Lean Cheng who was the defendant's project engineer supervising the construction of the extension of the hotel inclusive the piling work is basically that the cracks on the mansion existed before the piling works. He cited the factors that caused those cracks to be traffic induced vibrations, weather, moisture temperature variation, shrinkage, expansion, settlement of the foundation and the additional load imposed by the new tiles on the floor of the balcony. He referred to the transport and road research report conducted in england (D42 bundle E pp 11– 30) and the vibrations and monitoring report (D43 bundle E pp 31– 60) to support his views. DW1 explained that the piling did not cause any cracks as the first 60 feet of soil below the existing ground level contained silty clayly soil of sediment origin and any vibration caused by the piling would be minimal and would not be greater than the vibration caused by a fully loaded lorry travelling near the mansion. He opined that the existing ten feet deep reinforced concrete retaining wall and an existing five feet deep concrete drain along the back lane would have served as a diaphragm to buffer and counteract any effect of piling. The defendant had also taken precaution to drop the hydraulic hammer from a lesser height and did the piling away from the mansion. DW1 denied any damage caused to the mansion and contended that PW2's conclusion in his reports was wrong and a big mistake. He further contended that the mansion is more than a century old; it is natural that many cracks appear in such an old building. He alleged that perhaps plaintiff wishes the defendant to keep them (plaintiff) in their conservation exercise. On the soil investigation report, DW1 confirmed in cross-examination that there was no soil investigation report before commencement of the piling but that they had borrowed a soil investigation report from an adjacent site to design the piling foundation. He said he did not examine the mansion before and during piling works and agreed that without that benefit of observing the mansion before or during the piling, he was not in a position to give expert opinions on

A the cracks whether they arose as a result of the piling. He said that the plaintiff is cheap enough to look to the defendant to pay for their conservation work on the mansion.

B **[16]** From the evidence of the key witnesses of the plaintiff and the defendant, the undenied fact is that there were cracks in the mansion of which the plaintiff contended that they were clean and fresh cracks caused as a result of the defendant's piling work while the defendant contended that the cracks pre-existed the piling or that they were caused by vibrations from passing traffic, weather temperature variation and so on. PW2 and DW1 are the expert C witnesses for the respective parties each giving their respective views as reflected in their respective reports and evidence in court which are apparently conflicting. In *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd*, His Lordship Vincent Ng Kim Koay J (as he then was) said at p 364 as to treatment of conflicting expert evidence as follows:

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> As there is conflict in expert evidence, the court's approach in evaluating such conflicting evidence besides evaluation of credibility — is not only to examine the scientific grounds and basis on which they rely (see case *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party)* [1984] 2 MLJ E 202) but also in my view, if one of the experts is involved in the impugned-works (as here), the court may examine the manner in which he had implemented the proposed works as an engineer.

F **[17]** From these two witnesses, one distinction I can draw from their evidence is that PW2's evidence apart from his opinion, is based primarily from what he had seen and examined upon the site inspections on the mansion and the piling site and what he felt at these site visits especially when the piling work was in progress while DW1 did not visit in particular the mansion before or during the piling work. The cracks that PW2 saw were at the mansion while G what DW1 had seen or referred to were cracks at the boundary wall outside the fence of the mansion which is not the subject matter nor part of the plaintiff's claim. After piling works, DW1 had even been invited to visit the mansion but he did not show any interest to record his observation of the conditions when he was there. Hence the views or opinions expressed by DW1 that the cracks H were not caused by the vibrations from the defendant's piling works as the cracks were pre-existing and old cracks are based purely on his assumptions which are bare assertions and conjectures as they are not substantiated by any fact. PW2's evidence on the other hand, are akin to facts finding as he had visited the respective piling site as well as the mansion itself. He had seen, I examined and found the cracks on the mansion to be clean and fresh cracks with no fungus growth or stain marks. He could feel the extensive vibrations at the mansion when the defendant's piling was in progress. He had inspected the mansion on four occasions ie on 28 March 1996, 29 March 1996, 19 July 1996 and 2 August 1996 although his report P27 was made after the second visit. All

the cracks that PW2 found were localised at the north-east wing of the mansion which was nearer to the piling site while at the south-west wing of the mansion which was far away from the piling area, PW2 had made an inspection and found no cracks. When PW2 was observing the piling works in progress from the first floor balcony at the north-east end of the mansion, he could feel the extensive vibrations at where he was standing which was approximately 9m diagonally from the pile that was being driven. He also noted the piles adopted are 400mm diameter precast RC spun piles, classified as full displacement piles, which used a 5000kg hammer with a drop height of 600mm to drive in the piles. This could induce considerable vibrations. This court having considered the evidence and reports of both engineers, is inclined to accept the evidence and professional view of PW2 that the piling works of the defendant which commenced on or about 18 March 1996 had resulted in the cracks appearing on parts of the mansion nearest to the piling site which is more probable and is well founded from his own examination and observation. This court finds it inprobable in relation to the evidence of DW1 that the cracks were pre-existing and were caused by traffic vibrations and other factors but not by the piling works of the defendant. The defendant had not come up with any evidence to explain why the cracks were localised in the region of the mansion nearer to the piling site whereas no cracks were found on the other regions of the mansion further away from the piling site. It is also unconceivable, bereft of any evidence, that traffic induced vibration or weather or moisture temperature variation or shrinkage etc as stated by DW1, could cause the cracks to be localised only at the north-east wing of the mansion which was nearer to the piling site of the defendant. It is not probable for such factors as contended by DW1 to cause cracks to be localised only at the north-east wing of the mansion. When the plaintiff had established the facts that the cracks could probably be caused by the piling works of the defendant, the onus of proof had shifted to the defendant but defendant could only adduce bare assertions that the cracks were old existing cracks on the assumption that the building was century old without acknowledging the fact that it was completely restored practically to its original state in December 1995 and without showing any interest to assess or examine the cracks and/or other damages at the mansion to ascertain whether they were probably fresh cracks caused by the piling works. Instead defendant was obstinate and insistent that the piling work could not have caused any damage to the mansion and contended that the mansion did not collapse as a result of the piling nor did PW2 personally see the cracks being surfaced when the piling was in progress. Such perception by the defendant only reflects how unprofessional they are as they only expected serious or disastrous consequences to occur before they would start to think of the change to their decision on the system of piling used. It is shocking to note the indifferent attitude of the defendant and/or DW1 towards the safety of their neighbours. They had ignored the fact that when the consequences of their conduct will cause harm to their neighbour and is reasonably foreseeable, there is a duty of care on the defendant to prevent such consequences. For the defendant to insist

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on the plaintiff to prove that they had actually seen the cracks surfacing at the mansion when the piling was on going is to require the plaintiff to prove, not on a balance of probabilities but beyond reasonable doubt which is the criminal standard not applicable to civil cases as in the instant case. Such argument is untenable.

[18] Having considered the evidence of both parties and in particular, the evidence of PW2 and DW1 who are the experts, I find on a balance of probabilities and upon finding of facts that the cracks and/or damages to the mansion were caused as a resulting of the piling works carried out by the defendant. As the consequences of the defendant's act extended to their neighbour, the plaintiff, by causing physical damage to the plaintiff's mansion, I hold that the plaintiff has proved, on a balance of probabilities, a nuisance as defined in *Clerk and Lindsell on Torts* para 18-05.

Negligence

[19] Learned counsel for the plaintiff submitted that the plaintiff's action is also grounded on negligence in that the defendant had not only failed and/or neglected to adopt an appropriate system of piling to avoid vibrations and cracks to the mansion but had also failed and/or neglected to comply with such standard practices in building operations to prevent damage to the mansion. They cited *Clerk & Lindsell on Torts* at p 907 para 18-34 which says:

> If the defendant knews or ought to have known that in consequence of his conduct harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In such case the defendant is liable because he is considered negligent in relation to his neighbour, and here nuisance and negligence coincide. Whether his liability is described as falling under one legal rubric or the other would seem to be only a difference of words.

[20] They also contended that following the principle in *Donoghue v Stevenson* [1932] AC 562, the plaintiff is the person who is so closely and directly affected by the piling works and that the defendant ought reasonably to have them in contemplation as being so affected when directing their mind to the acts or omission which are called in question. Prior to the commencement of the defendant's piling, the admitted fact is that plaintiff's director PW1 had informed the principal of the defendant's civil engineers ie DW1 of PW1's concern that the excessive vibrations from the hammer-driven piles are very likely to cause damage to the mansion as the walls of the mansion are non-reinforced load bearing masonry walls which are sensitive to ground movements. PW1 himself is an architect and well experienced in heritage building conservation. DW1, however, held the view that there was no possibility of any damage by the hammer-driven piles and assured PW1 that there was no cause for concern as DW1 knew what he was doing.

[21] It is undisputed that the mansion is the neighbour of the defendant separated only by an 18ft wide service road between the extension site of the defendant and the back portion of the mansion. Having been specifically informed by PW1 of the probability that the excessive vibration from defendant's piling works would likely cause damage to the mansion particularly on account its non-reinforced walls, the defendant through its principal civil engineer DW1, knew or ought to have known that they were under a duty of care to prevent any such damage to the mansion in the conduct of their piling works as probable harm or damage in the circumstances of the case had already been made known to the defendant and was reasonably foreseeable taking into consideration the structure of the mansion which is built on non-reinforced load bearing masonry walls sensitive to ground movements which might not be able to withstand the excessive vibrations from the hammer-driven piles. I have no doubt that the defendant owed such a duty of care to the plaintiff. With that duty of care being manifested, the defendant had nevertheless proceeded on confidently with the hammer-driven piles without even exercising the fundamental care to inspect the plaintiff's mansion to ascertain whether the building and its walls could withstand the vibrations caused by the hammer-driven piles as contemplated by PW1 as DW1 is a civil engineer and capable of determining that and more importantly, to conduct a soil investigation on the extension site before their piling commenced. The defendant contended that they had taken precautionary measure to allegedly reduce the vibrations and/or soil or ground movements. That apparently is either improper or insufficient to avoid cracks and/or damages to the mansion. Within 24 hours of the commencement of the piling works, according to PW1, cracks began to appear on the walls of the mansion as a result of the excessive vibrations caused by the piling works. The defendant ought to have exercised reasonable care and skill and perhaps used an alternative piling system to avert damage or injury to the building of their neighbour. The defendant's failure to exercise such reasonable care and skill to avoid damage to the mansion will attract penalty for disregarding their neighbour's rights; see *Andreac v Selfridge & Company Limited* [1937] All ER 255, 268 (CA). On the importance of soil investigation, it has been well described by His Lordship Vincent Ng Kim Koay J (as he then was) in *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd* which has been endorsed by the Court of Appeal in the same case and extracted as follows at p 535:

> It is common ground that the engineer Mr Loh had made no examination of the soil in the extension site but had rather adopted the soil investigation of the piece of land adjacent to the hotel.
>
> This court is unable to accept how Mr Loh could comment and least of all vouch for the safety of the mansion whence he had not even caused the essential pre-requisite procedure of a soil investigation to be carried out before designing the foundations of a twenty-storey structure and before proceeding with the piling works …

A The importance of soil investigation report is far too crucial to be ignored particularly when the defendant's engineer has acknowledged that Penang Island is notorious for its land settlement problems as evidenced by the foundation settlement on the infamous Northam Court …

B

[22] I must agree that the soil investigation is an essential pre-requisite procedure pursuant to Penang Island (Earthworks By-Laws 1975 ('the By-Laws 1975') that the defendant and/or its engineer ought to have complied with not only to ensure the safety of its own extension works but also the safety of its C neighbouring building and in particular the mansion of the plaintiff which may be more fragile on account of its walls being non-reinforced load bearing masonry sensitive to ground movements. The By-Laws 1975 requires any plans, specifications and calculations submitted shall comply with the British Standards Code of Practice on Site Investigations, Earthworks and D Foundations. The British Standard Code of Practice 2001 on preliminary investigations and design consideration show, inter alia, that an investigation of the ground should be carried out by competent and experienced persons in accordance with BS 5930. Borings should reach depths adequate to explore the nature of the soil both around and beneath the proposed piles, including all E strata likely to contribute significantly to settlement. The design of pile foundations calls for specialised knowledge and requires an understanding of the ground conditions, the reaction of the ground to the various types of piles and the effects produced by the applied loads. The preliminary investigation should include a careful appraisal of nearby structures and substructures F including the types and layout of all services near and through the site. The choice of pile may be influenced by the effects which its installation would produce on these structures and services. Had the defendant carried out such pre requisite soil investigation and taken into account the effect of the piles on nearby structures and other properties, it would probably have erased any G doubt that the hammer-driven piles used by the defendant could probably have not caused the vibrations which would adversely affect the plaintiff's mansion resulting in cracks and/or damages to it since defendant had taken into consideration the soil condition. Even though defendant had adopted a soil H investigation of an adjacent land to the hotel, to what extent and how far the soil condition in that report resembled the soil condition at the extension site of the hotel is an unknown factor although DW1 readily said that there was no difference. This court finds that by the failure of the defendant to conduct soil investigation on the hotel extension site, the lingering doubt remains whether I the soil condition in the hotel extension site could be confidently said to be similar or the same as in the other soil investigation report relied on by the defendant. The defendant should not have compromised the safety of its 20 storey hotel extension nor the safety of its neighbouring buildings by abdicating such crucial soil investigation on the extension site.

[23] By-Law seven of the Penang Island Earthworks By-Laws 1975 requires, unless exempted by the Local Government Board Management, a developer (as the defendant herein) to submit, inter alia, a method of protective piling and also the precautions taken to protect the adjoining, lands, buildings, roads and other properties. The defendant had apparently also failed to comply with such requirement.

[24] In addition, the defendant also failed to comply with the Street, Drainage and Building Act 1974 ('the 1974 Act') by not submitting to the local authority plans and specifications in respect of the earthworks and obtained the approval before carrying out any earthworks which include any act of excavation leveling, filling with any material, piling, the construction of foundations etc (s 70A(10)). DW1 said that this was never done and the local authority had never insisted that they must submit their earthworks plans for approval. In this respect, s 70A(1) of the 1974 Act had clearly provided the statutory requirement that no person shall commence or carry out or permit to be commenced or carried out any earthworks without-having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority. It is for the defendant who intends to conduct the development of the extension site to comply with that requirement. When the defendant had elected not to comply with such statutory requirement, it is not a valid reason for them to attempt to allege that the local authority had not insisted on the submission of earthworks plan for approval before the commencement of any earthworks. In fact the local authority had exercised its power under s 70A(4) of the 1974 Act to issue the order for the cessation of the defendant's piling works. This would have refuted the allegation that the local authority did not insist on the requisite earthworks plan under s 70A(1) of the 1974 Act. The need to comply with the statutory requirements are fundamentally to ensure not only the safety of the development of the developer (the defendant herein) but also the safety of the adjoining lands, buildings, roads, other properties and services. It is through the control by an independent authority such as the local authority as in here that assurance of safety could be maintained vide its approval upon full examination of the earthworks plan with the soil investigation report submitted in accordance with the requirements of the law. The breach thereof can be construed as an act calculated to compromise the safety procedure laid down which is not excusable. From the evidence above, the conduct of the defendant in failing to heed the concern of PW1 who had categorically informed DW1 of the probable damage to the mansion if defendant were to use the hammer-driven piling system on its hotel extension site and the breaches by the defendant to comply with the 1974 Act and the by-laws 1975, this courts finds as a fact that the defendant had failed to exercise reasonable care to the plaintiff to prevent any damage or injury to the plaintiff's property ie the mansion when the defendant persisted to use the same piling system which created excessive vibrations that had caused cracks and/or damage to the

mansion. Hence, there is a breach of duty of care on the part of the defendant in the circumstances which resulted in damages to the plaintiff which from a reasonable man's perspective was foreseeable having known the fact that the mansion's walls were non-reinforced load bearing masonry sensitive to ground movements; see *Donoghue v Stevenson*. On a balance of probabilities and upon the facts of this case, I find that the plaintiff had proved negligence against the defendant henceforth.

Second issue: Whether the cracks and/or damages to the mansion were caused by the piling works by the defendant on their land

[25] Evidence of PW1 shows that he had communicated his concern to DW1 before the commencement of defendant's piling work. PW1 being an architect himself had even suggested alternative system of piling. Nevertheless, DW1 insisted on the hammer-driven piles and asserted that he knew what he was doing. According to PW1, within 24 hours of the commencement of the defendant's piling works, cracks began to appear on the walls of the mansion. PW1 also gave detail account of the cracks and/or the damage to the mansion and supported his evidence with photographs. PW5, another director of the plaintiff also gave evidence as to the cracks and/or damages to the mansion vide her witness statement P32. She said the cracks and/or damages surfaced upon the commencement of the defendant's piling works and these cracks and/or damages worsened and were coupled with new cracks appearing till completion of piling. She also gave evidence that the plaintiff undertook remedial works some three years after the piling works had stopped which was on or about 25 August 1996. The piling work had commenced on or about 18 March 1996 and continued intermittently. An exparte interim injunction was granted by the High Court on 29 March 1996 restraining the defendant from continuing with the piling. The order of injunction was confirmed on 15 May1996 following an inter parte proceedings. The piling work recommenced on a full scale from 16 August 1996 for ten days following the suspension of the order of injunction for 14 days by the Court of Appeal until 25 August 1996. Evidence of PW1 and PW5 were supported by the plaintiff's expert witness, PW3 who is an independent consultant engineer and whose evidence this court has found in the preceding paragraphs herein above to be preferred as being empirical and well founded as compared to the defendant's expert, DW1, whose evidence and/or opinions were based on assumptions and bare assertions and to some extent self-contradictory such as his attribution of the cracks to traffic-induced vibrations citing certain case study which ironically was wrongly perceived by him as the findings of the said case studies in actual fact show that the fault on the buildings were not thought to be connected with vibration from traffic and 'the observed damage could be attributed more

plausibly to other site factors than the exposure to traffic vibration' but not as opined by him that the cracks caused to the mansion were due to traffic induced vibrations.

[26] The defendant had contended that PW1 being the director of the plaintiff should not be the proper party to testify on the damages of the mansion suggesting probably that his evidence might be bias as he is not independent and he is also not a civil or structural engineer but an architect. PW1 and similarly PW5 who are directors of the plaintiff are indeed parties to the suit herein. Section 120(1)of the Evidence Act 1950 clearly provides that parties to the civil suit shall be competent witnesses. Hence their capacity as competent witnesses should not be an issue. As to PW1's ability to testify regarding the cracks and/or damages and perhaps certain aspects of the structure of the mansion, I do agree that probably an architect's knowledge will be less than that of a structural engineer in term of any structural descriptions or defects or damages of a building. However, PW1 is not only a qualified architect but is experienced in heritage buildings restoration and conservation works. He was also directly involved in the restoration of the mansion until its completion. From my observation of his demeanour as a witness, I find him to be firm, cogent and credible in giving his evidence. His evidence on the cracks and/or damages to the mansion did not involve structural technicalities but rather the structural aspects which are within his knowledge as an architect experienced in heritage buildings conservation which this court finds to be indeed valuable and relevant in relation to the structural aspects of the mansion. This court does not find any valid reason to doubt PW1's credibility to reject his evidence. Comparing PW1's evidence with that of DW1 who is also not a structural engineer but a civil engineer and who was not experienced in heritage buildings restoration and conservation nor has he personal knowledge of the structural aspect of the mansion, I find PW1's evidence to be more convincing especially when he was directly involved in the complete restoration of the mansion as the consultant architect and able to describe all those cracks and/or damages which are also illustrated by photographs or drawings.

[27] On a balance of probabilities and upon a finding of fact coupled with the findings in the preceding two issues, I hold that the plaintiff had proved that the cracks and/or damages to the mansion were caused by the piling works on the defendant's land.

Third issue: Whether the plaintiff has proved the damages as claimed

[28] Learned counsel for the plaintiff submitted that the foreseeability of damage arising from the piling works to the defendant is evident from the policy of insurance taken by both the defendant and their contractor Hong

Hing Thai Enterprise Sdn Bhd ie the third party. According to the general cover note D47 (bundle F p 6 or 8 which are the same document), the sum insured covers inter alia 'piling works (spun piling)' and 'vibrations'. It was also submitted that once the foreseeability of damage is satisfied, the defendant is obliged in law to take the mansion as it stands and is answerable for the full extent of the damage which the mansion has sustained whether owing to some sensitivity or susceptibility citing the 'egg-shell skull rule' as stated in para 7-192 in *Clerk & Lindsell on Torts* which is as follows:

> *The 'egg-shell skull'* rule. Long before *Wagon Mound* it was an established doctrine that a defendant has to take his victim *talem qualem*, which means that if it was reasonable to foresee some injury, however slight, to the plaintiff, assuming him to be a normal person, then the defendant is answerable for the full extent of the injury which the plaintiff may sustain owing to some peculiar susceptibility. The doctrine under consideration applies only when the plaintiffs pre-existing hypersensitivity is triggered into inflicting the injury complained of, or an existing injury is aggravated by the defendant's act … The commonest examples of the hypersensitivity type of case are persons who have the misfortune to suffer from haemophilia or 'egg-shell skulls'. Mackinnon LJ said that 'one who is guilty of negligence to another must put with idiosyncrasies of his victim that increases the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one'. (*Owens v Liverpool Corp* [1939] 1 KB 394 at pp 400 — 401)... Where the expected magnitude of the damage is caused by the unexpected sensitivity of the property damaged, it is submitted that here too the defendant should be liable for the full extent. To distinguish between personal and property damage in respect of hypersensitivity would be unacceptable …

[29] In the instant case, the defendant was well aware of the possibility or probability of damage to the mansion which had non-reinforced walls from the concern expressed by PW1 to DW1 which the defendant ought to endorse that they had been fore-warned. Foreseeability of damage on the defendant, to this court, is proved by the plaintiff as defendant ought to have so anticipated since their attention had been drawn to the non-reinforced structure of the mansion that hammer-driven piles system with its excessive vibrations might likely cause damage to the mansion. The defendant's contention, principally is that the mansion itself is century old; it is fragile and vulnerable. Hence the cracks and/or damages had or would have occurred as a matter of course. Defence also contended that the cracks as appeared were superficial, with dirt marks and traces of fungus and produced several photographs of the cracks which as submitted by the plaintiff were actually cracks on the boundary wall and not cracks on the plaintiff's mansion. Such contention is unsubstantiated under the thin skull rule above. Having been fully aware of the fragility of the mansion, all the most defendant ought to exercise more care to avoid any probable and foreseeable damage. On the defence's claim of reasonable user of land, plaintiff contended that there can be no defence to actionable nuisance when damage was caused to the mansion by the hammer-driven piling system

used by the defendant. The English case of *Hoare & Co v McAlpine* [1923] 1 Ch 167 is cited by learned counsel for the plaintiff which had been considered by His Lordship Vincent Ng Kim Khoay J in *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd* as it is directly on point. His Lordship said at p 368:

> I am however persuaded to adopt the approach taken in *Hoare and Company v McAlpine* (1922) 1 Ch D 167 (an English authority cited by counsel for the plaintiff, which was followed in *Chan Wing & Sons Realty Co v The Asia Insurance Co Ltd*, the facts wherein are not dissimilar to our current case. In that case: in preparing a site for a large building in the heart of the city, the defendant drove a very large number of piles into the soil, thereby setting up such heavy vibrations as to cause serious structural damage to an old house belonging to the plaintiff with the result that a greater part of the building had to be taken down in compliance with a dangerous structure notice. It was therein held that the plaintiffs house though very old was not in such an abnormally unstable condition as to prevent the vibration being treated as an ordinary actionable nuisance. Hence, in my judgment, as the hammer method of piling may cause nuisance that produces material damage or injury to property or persons it cannot in any event constitute reasonable user of land as contended.

[30] I share the view of His Lordship Vincent Ng Kim Khoay J and wish to echo that the hammer-driven piling system employed by the defendant had caused nuisance that produced material damage or injury to the plaintiff's property ie the mansion and it cannot constitute reasonable user of land. Once the defendant foresee some damage or injury to the plaintiff, they will have to take the plaintiff talem qualem. It is no defence to claim that the plaintiff's mansion is old and fragile. The egg-shell skull rule aptly applies in this instant case especially when the vulnerability of the mansion to damage had been expressly made known to the defendant. Hence, I find that the contention of the defence of reasonable user of land and the mansion being old and fragile cannot exonerate the defendant from their liability to damages in a claim grounded on nuisance.

[31] It was also submitted by the plaintiff that the defendant's defence that the mansion is frail and sensitive to vibrations of any kinds affords no answer to the plaintiffs claim of negligence citing in support *Clerk & Lindsell on Torts* (16th Ed) [1989] p 593 paras 10-155 which states:

> The manner of occurrence need not be foreseeable. Subsequent to *Wagon Mound* (*No 1*) the House of Lords has held that as long as the damage is of the expected 'kind', neither the unexpected extent of it nor the unforeseen manner of its incidence will absolve the defendant. In *Hughes v Lord Advocate* employees of the Post Office in breach of their duty left a manhole in the road uncovered. A canvas tent was erected over it and lighted paraffin lamps were placed round it. The pursuer, a child, who in the circumstances was held not to be a trespasser, picked up a lamp and with the aid of a ladder clambered down into the manhole. In the course of his reascent the lamp was knocked back into the hole. Through a most unusual combination of circumstances, as established by scientific evidence, an explosion

occurred and the pursuer was burned. The Lord Ordinary and the majority of the judges in the Scottish Court of Session, Inner House, held against the pursuer on the ground that, even though it might have been foreseeable that he would be burned by the oversetting of the lamp, it was not foreseeable that he would be burned by an explosion sparked off by the overturned lamp. The House of Lords unanimously rejected so subtle a distinction as this and held that as long as it was foreseeable that the pursuer might be burned by the lamp, it was immaterial that neither the extent of his injury nor the precise chain of events leading to it was foreseeable.

[32] Since the defendant had failed to exercise reasonable skill and care in their piling works which resulted in damage to the plaintiffs mansion for which the damage was reasonably foreseeable and indeed as this court has found earlier that the defendant had been forewarned by PW1 before commencement of the piling works of the probable or likelihood of damage that might likely be caused to the mansion and hence they knew or ought to have known the likelihood of such damage, any unexpected extent of the damage will not absolve the defendant from it, see *Hughes v Lord Advocate* [1963] AC 837.

[33] The general object of an award of damages is not to unfairly enriching the party who suffers those damages but to restore the party to his original position; hence the maxim of restitutio in integrum. As rightly submitted by learned counsel for the plaintiff, the general principle in the oft-quoted words of Lord Backburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at p 39 is that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'. In the case of tort causing damage to real property, the approach on the measures of damage could be by taking the capital value of the property in the undamaged state and comparing it with its value in a damaged state or by taking the cost of repair or reinstatement. This is as expressed by Donaldson LJ in *Dodd Properties (Kent) Limited v Canterbury City Council* [1980] 1 All ER 928, 938 cited by our Supreme Court in *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309; [1997] 2 CLJ 601. There is no qualm of the general principle of the award of damages and I shall consider the damages as claimed by the plaintiff vide their amended statement of claim in which they claimed general damages for nuisance; general damages for negligence; exemplary and/or aggravated damages; special damages: (i) the sum of RM126,602 or such amount as may be determined by the court to account for professional fees incurred by the plaintiff in monitoring and assessing the damage to the mansion during the course of piling works; (ii) the costs of rectification to make good the cracks and/or the damage to the mansion to be assessed by the senior assistant registrar (SAR) and the defendant be ordered to pay the said sum as assessed or alternatively, the sum of RM1.2m or such amount as determined by the court for the costs of

rectification and (iii) the sum of RM106,125 or such amount as may be determined by the court for professional fees of Laurence Loh Akitek in respect of the rectification works to make good the cracks and/or the damage to the mansion.

GENERAL DAMAGES

[34] In term of general damages for nuisance or negligence, the plaintiff conceded in submission that they are only entitled to one set of damages in consequence of the wrongful act of the defendant be it from nuisance or negligence. The plaintiff submitted that it is undisputed that they purchased the mansion for about RM2.75m and had expended a sum of RM3m in its restoration which took five years from 1990 – 1995 to complete. From the evidence of PW5, a director of the plaintiff, for the past nine years, they had to deal with the problems of the damages such as leaking roofs, damaged ceilings, leaking terraces and the cracks. Hence the plaintiff submitted a sum of not less than RM500,000 to be fair and reasonable for general damages for the hardship arising therefrom citing in support the Court of Appeal case of *Kris Angsana Sdn Bhd v Eu Sim Chuan & Anor* [2007] 4 CLJ 293 which had awarded a sum of RM1m as general damages for mental distress and hardship caused to the plaintiff arising from the construction works by the defendants which had damaged the building. In keeping with their duty to mitigate their losses, the plaintiff submitted that they had incurred the sum of RM223,629.34 (P35) over time when funds were available to effect temporary remedial works to enable them to use the mansion as a heritage bed and breakfast homestay and they are not seeking recovery of this said sum. However, the remedial works were temporary in nature and were unsatisfactory from a conservation standpoint. The specifications and methodology for the rectifications are as set out in the tender documents produced as P24. In this head of claim, learned counsel for the defendant submitted that the sum of RM500,000 is excessive and there is no basis to it. He also submitted that there is overlap of this claim with other damages sought by the plaintiff of RM 126,602 being professional fees incurred by the plaintiff, the sum of RM1.2m being the costs of rectifications to make good the cracks and/or damages and the sum of RM106,125 being professional fees for the subsequent rectification works. Learned counsel for the defendant distinguished the case of *Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor* [2007] 5 MLJ 13; [2007] 4 CLJ 293 from the instant case as the property in *Kris Angsana*'s case was uninhabitable according to appellant's/defendant's own consultant whereas the mansion herein was operating as a heritage hotel. As to the distress, it was submitted that the second respondent's health in *Kris Angsana*'s case had taken a dive on account of the persistent mental distress of seeing their home slowly disintegrating.

[35] Having considered the submissions by both parties and from the facts and evidence in the present case, the mental distress might not have been as severe as the case of the second respondents in *Kris Angsana*'s case where the premises was reduced to the state of being uninhabitable but the plaintiff's mansion was able to be used as a heritage homestay. Nevertheless, the hardship suffered by the plaintiff is not to be ignored. The plaintiff had spent five years to restore the mansion to practically its original state and it had indeed involved consideration costs. Within hardly three months after the completion of the restoration, defendant started their piling work which caused the cracks and/or the damage to the mansion. A reasonable person can undoubtedly perceive the amount of frustration in the plaintiff and the hardship they had to undergo having again to rectify the damage caused by the defendant's piling works bearing in mind they had not only expended huge sum but spent long years to restore to its original state. The fact that the plaintiff was able to use the mansion as a homestay should only be viewed as a mitigation of their losses which includes the fact that they did take remedial repairs to the damage to the mansion after the piling works amounting to RM223,629.34 for which they are not claiming. Had the plaintiff declined to take necessary steps to mitigate their losses, the ultimate damages could probably be more severe. It is therefore an unacceptable contention by the defendant that plaintiff are not entitled to general damages merely because they had taken action or steps to mitigate their losses. For general damages for nuisance or negligence which although distinct, seems to fuse in the circumstances of this case as they arose out of the same fact though they were under different consideration. I am of the view that the sum of RM500,00 as proposed should be fair and reasonable sum to compensate the plaintiff for the nuisance or negligence caused to them and/or their mansion and I therefore award this sum to the plaintiff as general damages.

SPECIAL DAMAGES

[36] The next head of plaintiff's claims as submitted by the plaintiff falls under special damages which include professional fees of RM 126,602 or such sum as may be determined by the court, incurred by the plaintiff in monitoring and assessing the damage to the mansion during the course of the defendant's piling works, the sum of RM106,125 or such sum as may be determined by the court of professional fees of Laurence Loh Akitek in respect of the rectification works to make good the cracks and/or damage to the mansion, and the sum of RM1.2m or such sum as may be determined by the court as the costs of rectification to make good the cracks and/or damage to the mansion as a direct consequence of the piling works of the defendant.

[37] On the claim of rectification costs estimated at RM1.2m, Soo Eng Hooi (PW3) of Success Construction Sdn Bhd, a contractor, who had tendered for the said rectification works on 1 Jun 1997, had quoted the price of RM683,500

for the whole and complete rectification works and/or repairs of the mansion. Given the current costs of materials and labour, he said that the costs would be in the region of RM1.2m. His quotations were based on the conditions of the tender, the method and schedule of the work and the costs of labour and materials. Saw Soon Kooi (PW4), the quantity surveyor who prepared the tender documentation P24 gave his estimates of the costs for the rectification in 1997 to be RM650,000 to RM700,000 and the current costs to be RM1.2m of which 80% would be attributed to labour costs apart from the material costs. The defendant's contention is that the estimated costs are excessive and that duplicity exists having regard to the general damages. There is however no evidence being led by the defendant to suggest the costs which are deemed fair and reasonable to counter the costs estimated by PW3 and PW4. If the defendant wanted to challenge the estimation of the costs of rectification and/or repair as claimed by the plaintiff vide evidence of PW3 and PW4, the onus is on them to adduce sufficient evidence to rebut the plaintiffs evidence; see ss 102 and 103 of the Evidence Act 1950. Bereft of such evidence, the allegation of the defendant through DW1 of the estimate costs to be excessive becomes bare assertion since it is unsubstantiated by any evidence. On the question whether the plaintiff is entitled to claim the costs of rectification only years later, I find this to be non issue as the plaintiff had in fact filed their claim in the same year of the wrongful act of the defendant resulting in damages to the mansion. It is unfortunate that this case had taken 14 years to be able to finally proceed on with the trial because of various proceedings in between. There is no deliberate delay on the part of the plaintiff to justify any blame on them. In any event, as Megaw LJ said in *Dodd Properties (Kent) v Canterbury City Council* [1980] 1 WLR 433 (CA) at p 451, 'the true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can having regard to all relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages'.

[38] In the circumstances of the present case, the assessment of costs of rectification should be that of the current time. General damages and special damages are distinctive from one another and there is no question of duplicity of these two heads of damages. In *Halsbury's Laws of England* (4th Ed) Reissue para 812, the distinction between 'general' and 'special' damages is well illustrated as follows:

> A distinction is frequently drawn between the terms 'general' and 'special' damages, which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract), general damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two

terms is also drawn in relation to proof of loss; here, general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in financial terms. A third distinction between the two terms is in relation to pleading: here, special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered.

[39] However, taking into consideration that the mansion is now about 14 years from the time of the cause of the cracks and/or damage had occurred, wear and tear might have intertwined with the damages which may escalate the costs of rectification and/or repairs and the fact that the estimation of the costs of rectifications/repairs by PW3 and PW4 was not in detail itemised account giving rise to some contingencies of error in the estimates, it is thus fair and reasonable to take them into consideration in the award of the rectification costs. The defendant contended that special damages must be pleaded and that plaintiff had failed to so plead them. Hence plaintiff is not entitled to these claims. However, from the amended statement of claim which had been amended with the consent of all parties, all these special damages have in fact been duly pleaded vide the amendments. There should not be any cause for complaint, since the defendant had conceded to the amendments by the plaintiff. The authority of *Real Marble Works Sdn Bhd v Teh Khoon Chuan Trading Sdn Bhd & Ors* [1999] 6 MLJ 140; [1999] 3 AMR 3393 where particulars of special damages were not pleaded and hence the claim in reality became a claim for general unliquidated damages which must be proved, as submitted by defendant, is therefore not applicable. Taking into account all relevant factors, I am of the view that a sum of RM1m should be the fair and reasonable sum as the costs for the rectification and/or repair of all those cracks and/or damages to the mansion; it suffices to cover the costs and will not be an unjust enrichment to the plaintiff. As for the professional fees of RM126,602 and RM106,125 respectively, in the absence of any evidence to the contrary, I accept the evidence of Mr Laurence Loh, PWI that these are the professional fees incurred and/or to be incurred for the rectification works to make good these cracks and/or damages to the mansion. The plaintiff is therefore awarded RM1m for costs of rectification to the mansion and professional fees of RM126,602 incurred in monitoring and assessing the damage to the mansion during the course of the defendant's piling works, and the sum of RM106,125 in the rectification works to make good the cracks and/or the damage to the mansion (*KC Lim & Association v Pembenaan Udarama Sdn Bhd* [1980] 2 MLJ 26 (FC)).

AGGRAVATED / EXEMPLARY DAMAGES

[40] The plaintiff next claims for aggravated and/or exemplary damages.

Learned counsel for the plaintiff submitted that there is a distinction between aggravated damages and exemplary damages. Aggravated damages are awarded where the tort has injured the plaintiff's proper feelings of dignity and pride whereas exemplary damages are awarded to teach the defendant that tort does not pay and to deter him and others from similar conduct in the future citing *Clerk & Lindsell on Tort* (17th Ed) 1995 at paras 27-66. Indeed, Her Ladyship Heliliah JCA (now FCJ) has endorsed the distinction in the meaning of aggravated damages and exemplary when she said in *Bumiputra-Commerce Bank Bhd v Top-A Plastic Sdn Bhd* [2008] 5 MLJ 34 that:

> My own view is that no English case, and perhaps even in no statute, where the word 'exemplary' or 'punitive' or 'aggravated' occurs before 1964 can one be absolutely awe that there is no element of confusion between the two elements in damages. It was not until Lord Devlin's speech in *Rookes v Barnard* that the expressions 'aggravated', on the one hand, and 'punitive' or 'exemplary', on the other, acquired separate and mutually exclusive meanings as terms of art in English law.

[41] This would probably explained why the two damages were invariably claimed as if they were one same head of damages prior to *Rookes v Barnard* [1964] AC 1129. The plaintiff submitted that their feelings of dignity and pride had been injured on grounds that through their conservation architect and director PW1, defendant's civil engineer DW1 had been urged to cease the said piling works pending the adoption of an appropriate piling system to avert vibrations and to avoid any damage to the mansion but to no avail. The measures proposed by PW2, the plaintiff's consultant engineer for a vibration breaking trench to be dug between the sites with sheet piling or timber shuttering of the trench wall had received no response from the defendant. The stop work orders from MPPP vide P21A and P21C issued to the defendant had fallen on deaf ears. The defendant had proceeded to obtain a suspension of the High Court Order of Injunction dated 15 May 1996 from the Court of Appeal on 16 August 1996. DW1 had ventured to cast aspersions on the integrity of the plaintiff by saying that the plaintiff are cheap enough to look to the defendant to help them pay for the costs of conservation. The plaintiff further relied on the evidence of their director PW5's evidence that all the shareholders of the plaintiff company were not only helpless as the piling works continued but were also overwhelmed with fear that the whole of the mansion which had just been restored might either collapse or suffer irreversible damage.

[42] Benchmarking the award of RM1m as general damages though for mental distress and hardship by the Court of Appeal in *Kris Angsana Sdn Bhd v Eu Sim Chuan & Anor* , the plaintiff submitted a sum of not less than RM750,000 would be fair and reasonable as aggravated damages for the distress and injury to the feelings of the plaintiff.

[43] On exemplary damages, plaintiff submitted that the defendant had proceeded to complete their piling works in clear breach of their duty of care with a view of fully utilising their machinery and manpower deployed at the extension site thereby minimising their costs and/or making a profit at the expense of the plaintiff. Referring to the affidavit of defendant's managing director affirmed on 8 April 1996 (bundle H pp 56–59) for the injunction proceedings, the defendant would 'incur loss of about RM60,000 per day in terms of rental and other incomes, exclusive of the damages that the defendant may have to pay to third parties like its contractors and its suppliers if injunction is allowed to remain'. DW1 had also stated in his affidavit affirmed on 8 April 1996 (bundle H pp 42–50) that not only would the defendant suffer substantial and irreparable damage in terms of any breach of the contracts between the defendant and their contractors and suppliers, defendant would also suffer 'further irreparable damage in goodwill for being unable to provide rooms for tourist especially at the coming Commonwealth Games.' The defendant's managing director in his further affidavit on 8 August 1996 (bundle H pp 133–139) had made no secret of the defendant's intention to complete the piling works and gave their undertaking to pay damages to the plaintiff in the event that plaintiff would suffer damage as a result of the continuance of the piling works since the hotel extension was planned to complete by the Commonwealth Games in the year 1998. Citing the cases of *Rookes v Barnard* , *Broome v Casell & Co* [1972] AC 1027 and *Kris Angsana Sdn Bhd v Eu Sim Chuan & Anor* , the plaintiff submitted that a sum of not less than RM750,000 would be fair and reasonable as exemplary damages taking into consideration also the unlawful conduct of the defendant in flouting the Penang Island Earthwork By-Laws 1975 and the Street, Drainage and Building Act 1974.

[44] The defendant contended in submission that PW5's evidence does not show that there is distress and injury to the feeling of the plaintiff unlike the case in *Kris Angsana Sdn Bhd v Eu Sim Chuan & Anor* where the plaintiff therein had proved that he had suffered mental distress; the building/bungalow had collapsed and the damage was RM6m. The damage of the mansion from Soon Eng Hooi's (PW3) evidence was around RM680,000. Hence it is submitted that the sum of RM750,000 suggested by the plaintiff as aggravated damages is excessive. On exemplary damages, learned counsel for the defendant relies on *Law of Tort in Malaysia* by Norchaya Talib to submit that exemplary damages are only given in very rare circumstances. He contended that the plaintiff should not use affidavits in the previous injunction proceedings to show malice and motive of the defendant; there is also nothing outrageous and malicious to merit punishment of the defendant's conduct. He contended the sum of RM750,000 as suggested by the plaintiff is excessive and ought not to be granted as defendant was genuine in the extension on their land which had been approved by the municipal council.

[45] Aggravated damages. In the *Law of Tort* (9th Ed) 2009 by Professor John Cooke, the learned author said that aggravated damages 'are awarded where there is outrage to person or property and are best regarded as compensatory. They are to compensate for injury to the claimant's pride or feelings'. In *Mc Gregor on Damages* (15th Ed) 1988 pp 409–410, aggravated damage is said to be:

> ... aggravated damage - that is, as cases of extra compensation to the plaintiff for the injury to his feelings and dignity

[46] In *Ley v Hamilton* (1935) 153 LT 384, 386 (HL), Lord Atkin had afforded a good explanation and example of injury to a claimant's feelings and dignity in a case of damages for defamation in the following words:

> (Aggravated damages) are not arrived at... by determining the 'real' damage, and adding to that sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained that the damages are at large. It is impossible to track the scandal, to know that the quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation.

[47] It is clear thus that aggravated damage is awarded as a form of a higher compensation to show the disapproval of the acts of a defendant which were carried out in such a manner that the plaintiff has suffered more than would normally be expected in such a case. (*Tort Law* by Catherine Elliot and Frances Quinn (7th Ed) 2009). And such damage is to compensate the plaintiff an extra sum for the injury to his feelings and pride or dignity. In *Rowlands v Chief Constable of Merseyside Police* [2006] 1 WLR 1065, where Mrs Rowlands sued Merseyside police for assault, false imprisonment and malicious prosecution, the Court of Appeal had examined the role of aggravated damages as compensation and held that Mrs Rowlands should receive aggravated damages even though the police had argued that this would tantamount to compensating her twice. This is because her compensatory damages included an amount for psychological injury.

[48] In *Halsbury's Laws of England* (4th Ed) Reissue para 1148, it states that:

> 1148 Aggravated damages. Where the plaintiffs claim is for aggravated damages, the pleading should contain a statement to that effect and should set out the facts on which he relies in support of his claim for such damages... The Rules of the Supreme Court do not expressly require that aggravated damages be pleaded, but by application of general principles the plaintiff is required to plead those special facts relied upon in support of the claim.

[49] Hence, it is a requirement under English law 'to plead those special facts relied upon in support of the claim' for aggravated damages. As aggravated damages refer fundamentally to the injury to the feelings and dignity or pride of the plaintiff, facts relating to and leading to the injury to the feelings and dignity or pride must be pleaded. Our Rules of the High Court 1980 (RHC) similarly do not provide that aggravated damaged must be categorically pleaded. However, we cannot deny the fact that injury to the feelings and dignity or pride is a condition of the mind of the plaintiff as to how he has suffered from the tortious acts of the defendant. Looking at O 18 of the RHC which governs pleadings, I am of the view that facts relating to the injury to the feelings and dignity or pride of the plaintiff may fall within r 12(1)(b) of the O 18 which requires necessary particulars of facts of any condition of the mind, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, to be pleaded. I am inclined to find that merely pleading the facts of the acts of the defendant without pleading specifically which of those special facts the plaintiff alleges to have caused injury to their feelings and dignity or pride does not satisfy the requirement of having pleaded aggravated damages although invariably aggravated damages will appear as a prayer in the claim. Before the plaintiff cites aggravated damages as a prayer or remedy sought in his claim, he must ensure that the remedy claimed must arise from the facts as made out in the body of the claim; O 18 r 15 of the RHC. From the amended statement of claim of the plaintiff, I find that the plaintiff has failed to plead the particular facts that the defendant's wrongful acts had caused injury to their feelings and pride or dignity despite the fact that their amendments to the statement of claims was done at the close of the whole case which was with the consent of both the defendant and the third party. This is a fundamental flaw in the plaintiff's claim for aggravated damages.

[50] From the evidence adduced before this court and the grounds relied on by the plaintiff in submission as stated above that briefly, PW1 had urged DW1 to cease piling work but it was not entertained; PW1's consultant engineer had recommended the method of reducing vibration but was not adopted; the defendant had failed to comply with MPPP's stop work order; DW1 cast aspersions on the integrity of the plaintiff saying that the plaintiff wanted the defendant to pay for their costs of conservation, the plaintiff contended that their feelings and pride or dignity had been injured. The plaintiff also relied on PW5's evidence that she and the shareholders of the plaintiff were helpless and overwhelmed with fear of the mansion collapsing or suffering irreversible damages. This court nevertheless finds absolutely no evidence from either PW1 or PW5, the two directors of the plaintiff that they felt hurt and their pride or dignity was injured by the failure of the defendant to heed their request to cease piling, to adopt their consultant engineer's recommended method of reducing vibrations or to follow the MPPP's stop work orders. The aspersions cast by DW1 were words said in court on cross-examination and they were not utterances or acts said and done at the material time which had injured the

dignity or pride of the plaintiff. The injury to the feelings and dignity must be at the time of the occurrence of the wrongful acts and similarly for words said. Hence these aspersions which came to light only during trial cannot be the ground to substantial the claim for aggravated damages. On PW5's evidence that she and all the shareholders of the plaintiff were helpless and overwhelmed with fear for the mansion as the piling works continued, I am more inclined to find that these are the natural feelings that follow from the defendant's neglect to heed their calls. The fear and frustration are natural when someone refuses to accede to the injured party's request and persists on an act which goes to the breach of a duty of care. The injury to the feelings and dignity must be more than the natural feeling that follows an event. In *Rowlands v Chief Constable of Merseyside Police* , Mrs Rowlands had complained to the police of a persistently noisy party opposite her home and get into a row with one of the police officers who had come to try to sort out the situation. She was arrested, handcuffed in front of her children, and taken to a police car, and when she asked to have the handcuffs loosened because they were causing excruciating pain, the police officer deliberately tugged them, increasing the pain. After being detained for 1 1/2 hours, she was charged with assaulting a constable in the course of his duty but she was acquitted. In her suit for assault, false imprisonment and malicious prosecution she was awarded, inter alia, aggravated damages. Upon appeal, the Court of Appeal found aggravated damages awarded to be appropriate given the amount of humiliation and distress caused as well as the willingness of the police to give false evidence against her. It was also because Mrs Rowland's compensatory damages included an amount for psychological injury. The intention to injure the feelings and dignity is found to be expressed or could be reasonably inferred. Each case, of course, will depend on its own facts. In the present case, defendant was persistent in the piling works because DW1 held the view that the vibrations from the piling works would not cause damages to the neighbouring buildings and secondly, defendant had a deadline to complete the extension of the hotel to cater for the 1998 Commonwealth Games. The defendant may be adamant in pursuing the piling works to build the hotel extension but I do not find that their act to continue with the system of piling is calculated to injure the feelings and dignity of the plaintiff nor did the plaintiff hold the view that their feelings and dignity had been injured; otherwise, they would have or ought to have so pleaded.

[51] I do not find it appropriate therefore, to order aggravated damages in the circumstances of this case.

[52] Exemplary damages. In *Tort Law* by Catherine Elliot and Frances Quinn, the learned authors said that 'Exemplary damages also involve paying the claimant more than would normally be appropriate, but they differ from aggravated damages in that their purpose is actually to offer a serious punishment to the defendant and to deter others from behaving in the same

way'. Exemplary damages is also known as punitive damages (*Law of Tort by Professor John Cooke*). In *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193, Lord Nicholls described subtly exemplary damages as distinct from aggravated damages in the following words:

> Exemplary damages are controversial topic, and have been so for many years. Oversimplified, the matter may be summarised thus. Awards of damages are primarily intended to compensate for loss, whether pecuniary or non-pecuniary. Non-pecuniary loss includes mental distress arising from the circumstances in which the tort was committed, such as justified feelings of outrage at the defendant's conduct. Damages awarded for this type of loss are sometimes called aggravated damages, as the defendant's conduct aggravates the injury done. Sometimes damages may also be measured by reference, not to the plaintiff's loss, but to the profit obtained by the defendant from his wrongdoing. Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter.

[53] The historical aspect of exemplary damages being awarded in the English legal history emanates in 1760s with the cause celebre cases of *John Wilkes* and the *North Briton* wherein the government's effort to stop the North Briton from being published, a variety of individuals suffered at the hands of public officials. It subsequently became a familiar feature of tort and extended to cases of assault, false imprisonment, defamation, seduction, malicious prosecution, trespass of land and trespass to goods. (*Mc Gregor on Damages* (15th Ed) 1988 pp 254–255). It was vide the case of *Rookes v Barnard* that the House of Lords had reviewed this award of exemplary damages in tort actions and held that except for the exceptional cases ie (i) where the conduct is calculated to make or to result in a profit, (ii) where there is oppressive conduct by government servants and (iii) where there is express authorisation by statute, it is no longer permissible to award exemplary damages against a defendant, however outrageous his conduct. Lord Devlin expressed his hope that the decision of the House of Lords in *Rookes v Barnard* would 'remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, … make much difference to the substance of the law or rob the law of the strength which it ought to have …'. The rationale for restricting exemplary damages to only three exceptional categories of cases is, in the words of Lord Devlin that 'aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes'.([1964] AC 1129, 1230). The aforesaid three categories of exceptional cases were further confirmed by the House of Lords in a subsequent case of *Cassell & Ltd v Broome*. Therefore, under English law as it is, exemplary damages are confined to only three categories of cases as listed out above. However, the Australian

jurisdiction does not adopt the new English approach. In *Australian Consolidated Press v Uren* [1969] 1 AC 590 (PC), the refusal by the Australia High Court to follow the English approach in libel action was upheld by the Privy Council on two grounds: that Australia had accepted the exemplary principle for damages for libel before *Rookes v Barnard* and that it was a matter for Australia to decide whether to change her settled judicial policy on this issue in the law of libel. In our Malaysian context, it appears our court do not adhere strictly to the English approach in total. For example, in *Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor* [2010] 3 MLJ 569, the Court of Appeal awarded exemplary damages for the wrongful detention of property ie 18 original issue documents of titles; in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19, His Lordship Edgar Joseph Jr SCJ awarded exemplary damages for trespass to land, inter alia.

[54] In the instant case before this court, it is apparent that the plaintiff is relying on the category that the conduct is calculated to result in a profit to claim for exemplary damages. Indeed submission of the plaintiff is confined to this conduct of the defendant. Learned counsel for the plaintiff cited what Lord Devlin had stated in *Rookes v Barnard* that is relevant here as follows:

> Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which he either could not obtain at all or not obtain except at a price greater than he wants to put down. (*Mc Gregor on Damages* (17th Ed) pp 178–179).

[55] Learned counsel also cited the principles of law expressed by Lord Morris in *Cassell & Co Ltd v Broome* in the House of Lords which explained the ambit of expression 'calculated to make a profit' used by Lord Devlin as follows:

> There may be exemplary damages if a defendant has formed and been guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him. (*Mc Gregor on Damages* (17th Ed) p 180).

[56] Indeed, the words of Lord Devlin in this respect are imperative that:

> The defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.

[57] By the term 'calculated to', it is no precise mathematical calculation as can be seen in the speeches of Lord Hailsham LC, Viscount Dilhorne and Lord Diplock in *Cassell & Co Limited v Broome*. The test to be applied in awarding exemplary damages is the nature of the conduct and not the basis of the cause of action; see *Kuddus v Chief Constable of Leicestershire Constabulary* which overruled the decision of the Court of Appeal in *AB v South West Water Services Limited* [1993] 1 All ER 609 where the Court of Appeal held that exemplary damages could not be awarded for public nuisance or any tort for which exemplary damages had not been awarded before *Rookes v Barnard* ie a 'cause of action' test which was in addition to the requirement that the defendant's conduct fell into one of the two categories.

[58] It is firstly to be noted that as in the case of aggravated damages, there is the same requirement for exemplary damages to be pleaded. *Halsbury's Laws of England* (4th Ed) Reissue para 1147 states:

> Exemplary damages. The claimant must specifically plead any claim for exemplary damages, together with the facts on which he relies. The assertion of such a claim needs to be made in the body of the claim and not just in the prayer, because all of the facts giving rise to the claim must be set out.

[59] The general approach of pleadings filed in our court claiming for exemplary damages, to my limited knowledge, is to quote it as a prayer in the statement of claim without specifically pleading it with the facts relied on in the body of the claim. By the rule of pleadings as cited above, that itself is glaringly insufficient for the court to consider the award of exemplary damages least to mention the evidential aspect which must necessarily be proved on a balance of probabilities. There is a need to revisit such an approach should exemplary damages be sought as a head of damages claimed so that such claim is specifically pleaded in line with the rules of pleadings.

[60] The defendant contended that the plaintiff had failed to plead exemplary damages and is therefore not entitled to such claim. Reading paras 18 and 19 of the amended statement of claim, the fact that the defendant's conduct in persisting with the said piling works notwithstanding the clear breach of their duty of care was thereby to minimise their costs and/or the make a profit at the expense of the plaintiffs and the fact that the costs saving and/or profits would in all likelihood exceed the damages at risk, I find that these facts introduced by amendments to the statement of claim were specifically pleaded in line with the category of exceptions as listed in *Rookes v Barnard* ie where the conduct of the defendant is calculated to result in a profit, although exemplary

and/or aggravated damages were only mentioned as a prayer in para 26(iv) therein. Since the facts relied on were specifically pleaded in this case, I am prepared to entertain consideration of such claim even though the words exemplary damages did not appear in the body of the claim but only appeared as a prayer as such prayer derived from the material facts as pleaded in paras 18 and 19 in the body of the amended statement of claim which when read with the wrongful act pleaded is in compliance with O 18 r 15 of the RHC. It would nevertheless be advisable that exemplary damages should be so pleaded with the facts in the body of the claim. The plaintiff's submission relied mainly on the affidavit evidence of defendant's managing director, Loh Boon Choon @ Loh Loo Teong affirmed on 8 April 1996 vide bundle H p 56–59 and on 8 August 1996 vide bundle H p 133–139 as well as affidavit of DW1 sworn on 8 April 1996 (bundle H p 42–50) filed in the injunction proceedings preceding this trial but adopted in this trial. The defendant's contention is that these affidavits should not be used as the facts in the affidavits were not subject to their re examination. To this court, affidavits are sworn statements and they are as good as sworn statement given by witnesses in court. Contents of the affidavit disclosed facts which were sworn to be true by the deponent and must be accepted as such. Hence the plaintiff can undoubtedly rely on defendant's own facts to argue on this matter as those facts sworn in the affidavits are relevant and material and these affidavits were filed in direct relation to the subject matter of this trial although they were specifically meant for the injunction proceedings. The question of re examination of the deponents of the aforesaid affidavits does not arise as there was no cross-examination by the plaintiff of these deponents in the first place and even if there was cross-examination, the plaintiff is not relying on any assumption of cross-examination to support their contention but on the sole facts as stated by the defendant's managing director and engineer (DW1) respectively. I find no merit in the defendant's argument in this respect and accordingly reject such submission.

[61] In defendant's MD's first affidavit sworn on 8 April 1996, plaintiff submitted that it was stated that the defendant would incur a loss of about RM60,000 per day in term of rental and other incomes, exclusive of the damages that the defendant might have to pay to third parties like its contractors and its suppliers if the injunction is allowed to remain. DW1's affidavit stated that in addition to the substantial and irreparable damage in term of any breach of the contracts between the defendant and their contractors and suppliers, the defendant would suffer further irreparable damage in goodwill for being unable to provide rooms for tourist especially at the coming Commonwealth Games. The second affidavit from the MD of the defendant sworn on 8 August 1996 had manifested defendant's intention to complete the hotel extension in the year 1998 for the Commonwealth Games and undertook 'to pay damages to the plaintiff/respondent in the event that the latter would suffer damage as a result of the continuance of the piling works.'

From these facts affirmed by the defendant's witnesses, it becomes clear that by progressing with the piling works, the defendant would profit from not suffering any losses which were substantial in relation to daily rental etc, damages to their contractors and suppliers for breach of contracts, and irreparable damage in goodwill but also the profits from tourists arriving for the 1998 Commonwealth Games if the hotel extension could be completed on time in 1998. In other words, what the defendant contemplated is that if the piling works could and did not proceed, there could be delay in the intended deadline for completion of the hotel extension which they might suffer extensive losses as well as irreparable damage in goodwill which could be more than the damages to the plaintiff. In the circumstances, they would proceed at all costs with the piling works which was the initial step of construction towards achieving the completion of their hotel extension by 1998 before the Commonwealth Games. The fact that defendant was prepared and undertook to pay damages to the plaintiff goes to show that defendant was desperate to proceed on the probability that their profits would override the losses or damages to the plaintiff for which defendant was appraised of the possibility of damages to the plaintiff's mansion from the system of piling that the defendant used. To echo what Lord Morris had said as quoted above: 'The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him'. I think this situation as contemplated by Lord Morris has arisen in the instant case. The defendant anticipated it would work out satisfactorily for them because they had taken out a public insurance policy which would cover any damage to the extent of RM900,000 and they were prepared to offer monetary security of RM300,000 to the plaintiff (ref para 7 of the second affidavit of defendant's MD—bundle H p 135). I venture to say that defendant expected the total sum of RM1.2m would take care of whatever damages the plaintiff might suffer and defendant would only cough out RM300,000 therefrom which would probably be lesser than their losses if they failed to complete the extension before the Commonwealth Games. Consequently, they were prepared to ignore plaintiffs rights to breach their duty of care to the plaintiff. Therefore, I hold that the plaintiff has proved this head of damages on a balance of probabilities.

[62] The plaintiff proposes the sum of RM750,000 as the fair and reasonable sum of exemplary damages citing *Kris Angsana Sdn Bhd v Eu Sim Chuan & Anor* where the Court of Appeal said as follows:

> When ordering any award under the heading of exemplary damages the resources of the appellant would be a relevant consideration for a company that was about to build a 20 storied two block-building, the above sum of RM500,00 was quite modest and would make no impact or its means.

[63] Although the principle purpose of awarding exemplary damage is punitive and deterrence ie to punish and deter the wrong doers for their conduct, the approach in the assessment is nevertheless one of moderation. See *Thompson v Commissioner of Police of the Metropolis and Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 (CA), a case involving police misconduct. Lord Woolf MR in delivering the judgment of the court even suggested that any improper conduct of the plaintiff can reduce or eliminate an exemplary damages if the conduct of the plaintiff caused or contributed to the behaviour complained of. Our Court of Appeal has also adopted the moderation approach in assessment of an award for exemplary damages in the case of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610 where His Lordship James Foong FCJ said:

Basically, the law sets down that this category of damages, if awarded, should be moderate and the resources of the parties must be taken into account. Other factors to be considered are the quantum of compensatory award as well as the conduct of the parties right down to the time of judgment. The gravity of the wrong is also another item to be taken into account. These are spelled out in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd*.

[64] Following the moderation approach adopted by the English Court of Appeal and our Court of Appeal as shown in the aforesaid cases, I am of the view that having taken into account the resources of the defendant and the compensatory damages awarded to the plaintiff as well as their conduct, I am of the view that the sum of RM350,000 would be fair and reasonable award to serve the intent and purpose of exemplary damages in the circumstances and I accordingly award this sum to the plaintiff.

INTEREST AND COSTS

[65] For the general damages of RM5000,000 and exemplary damages of RM350,000, one award interest in favour of the plaintiff at the rate 4%pa from the date of filing of the writ to the date of judgment under s 11 of the Civil Law Act and thereafter at the rate of 8%pa until satisfaction under O 42 r 12 of the RHC. For special damages, interest is awarded at 8% from date of judgment to date of realisation. I also order costs of RM25,000 in favour of the plaintiff.

THIRD PARTY CLAIM

[66] It is undisputed that the third party Hong Hing Thai Enterprise Sdn Bhd had entered into a contract to conduct the said piling works on the defendant's land for the hotel extension. To protect against any damages arising out of the said piling works, the third party had taken out an insurance coverage vide Policy No 96PE00003P from Uni Asia General Insurance (formerly

known as Overseas Union Insurance (Malaysia) Sdn Bhd dated 8 February 1996 (D47 which should be general cover note No 33413 in bundle F p 6 or 8). The defendant alleged that the third party in the performance of the piling works had caused vibrations which resulted in nuisance and damages to the plaintiffs property ie the mansion which is near the defendant's land thereby breaching their duty of care to take reasonable steps to safeguard the buildings, land of the plaintiff and the nearby land. The third party had duly notified the insurer and the insurer had also examined the damages to the mansion after the piling activities. Therefore the defendant claimed that the third party shall indemnify the defendant all the plaintiffs claim if and as ordered by this court. Meanwhile before commencement of this trial, the third party had been in liquidation. At the trial, the Insolvency Department did not appear for the third party and no witness statement was filed as regards this claim against the third party. Learned counsel Mr Bala Mahesan acting for the third party is in fact acting for the said insurance company. There is no doubt about that. From the letter from Jabatan Insolvensi Malaysia Pulau Pinang ref PPT(PP) 15/1998 dated 3 May 2010, it is clear that the Director of Insolvency Department Penang had given their approval for Messrs Bala Mahesan & Khairudin, Advocates & Solicitors to proceed to defend this civil suit and that Messrs Bala Mahesan & Khairudin was not bound under s 236 of the Companies Act and it did not require the approval from the Pegawai Penerima Malaysia since they were not acting for the third party but were acting for Uni Asia General Insurans Bhd for the purpose of safeguarding the interests of the said insurance company. In so far as the capacity of learned counsel for the third party, I find that it should not be an issue as the Insolvency Department had given its consent or approval for the learned counsel to proceed to defend the interests of the insurance company which is so doing, is to protect the interests of their insured, the third party. Hence by implication, learned counsel Mr Bala Mahesan is defending the third party although in term of retainer, Messrs Bala Mahesan & Khairudin were not retained to represent the third party and for that reason, the Insolvency Department held the view that s 236 of the Companies Act 1965 did not apply. In the circumstances, even though the Insolvency Department did not appear for the third party on the date of this trial nor file any witness statement, no default judgment can be ordered as submitted by the defendant since on record, Mr Bala Mahesan is defending the third party.

[67] In submission, learned counsel Mr Bala Mahesan asserted that the defendant, through their pleadings in their amended statement of defence and evidence of their witnesses DW1 Mr Loh Leng Cheng, the engineer, and DW2 Mr Loh Seow Hwa, defendant's general manager, had stated that they had been satisfied with the skill and the jobs of the third party. Hence it has been established that the third party had not defaulted in any way. Mr Bala Mahesan emphasised the evidence of DW1 that the third party had followed his instructions and there was no deviation by the third Party and he was happy

with the piling while DW2 had confirmed in cross-examination that the third party did no fault. Learned counsel submitted that the defendant had failed to prove negligence on the third party and prayed for the claim against the third party to be dismissed with costs. He further submitted that since the third party is insolvent, their absence should in no way prejudice them as they have filed their defence in compliance with O 16 r 5 of the RHC.

[68] The defendant submitted that the piling activities executed by the third party were to be done without causing any damage to the plaintiff's mansion; they should be accountable if this court finds that the piling activities caused the cracks and damage to the plaintiff's mansion vide res ipsa loquitur.

[69] The defendant's defence all along had been a denial of the cracks and/or damage to the plaintiff's mansion that were caused by the piling works carried out at their hotel extension site. In so doing, it is conceivable that they had to similarly deny the fact that the piling works carried out by the third party were faulty; otherwise their whole defence would collapse. Since this court has found above that the cracks and/or damage to the mansion were caused by the piling works conducted by the defendant through the third party which is undenied, the fact that the defendant's allegation that the piling works executed by the third party were not faulty would not relieve the third party of their liability under the policy which is to cover damages arising from those piling works to indemnify the defendant. In executing the piling activities, the third party would have a similar duty of care to the neighbours to the land they were doing the piling works to avert any damage to their buildings, properties, land and services. The third party cannot follow blindly the defendant's instruction. They must exercise reasonable care and skill of their own. Since there is no evidence at all from the third party being adduced in this trial, this court will hold that they had not rebutted the fact that their piling works had in fact caused damage to the mansion in nuisance and/or in negligence which ought to have been presumed to be true; see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 781; [2010] 1 CLJ 381 (FC). Therefore, third party is liable to indemnify the defendant for the general and special damages awarded against the defendant above excluding exemplary damages and costs which should be borne by the defendant as this court finds that it was the defendant who persist on the tortions act. Accordingly, this court orders as above.

Claim allowed.

Reported by Ashok Kumar